NOTES

THE POWER OF A MUNICIPAL CORPORATION TO ENGAGE IN BUSINESS.—In classical Rome fires were extinguished by private individuals for profit. London was originally policed by volunteer bands. In many mediaeval cities water was peddled through the streets by private vendors. The removal of garbage, paving, lighting and cleaning the streets, educating children, and many other enterprises were either done by individuals or not at all. Today city dwellers expect their municipal government to perform all of these services for them. The performance of these functions is such an established feature of city life that the power to carry them out is rarely if ever questioned.

Municipal corporations being creatures of law purely, derive their powers wholly from grant of legislative bodies. The powers come in two ways—from a charter of incorporation creating the city, village or town, and from subsequent statutes. The grants confer on the cities such powers as are specifically enumerated and also such other powers as would be implied from, or as are necessary and incidental to those specifically granted. In determining whether a city has the power to do an act it must first be determined whether the authority has been given it by one of the means above enumerated. If it has been given the next question is whether the granting of the authority contravenes any constitutional limitation.

Has a municipal corporation the power to engage in business? By engaging in business is meant the acts of supplying to its inhabitants or others commodities or services, either free or for remuneration, that are generally supplied by individuals as a means of livelihood. Certain services—principally extinguishing fires, police protection, maintenance of sewers, and general care of highways—have practically ceased to be businesses and become instead governmental duties which a city can and sometimes must carry out for its inhabitants.

In the vast majority of the cases the courts have engaged in determining whether the power has been granted by the legislature. Express grants of power are rarely questioned. But where a city claims a power through an implied grant, the court in reaching a conclusion as to whether the legislature intended to make such a grant, frequently is aided by inquiry into the question of whether the purpose is a public one. Such discussion resembles a decision on a constitutional point but it is not. It is merely a guide to the determination of whether a power has been granted. Yet it gives an indication of what a city can do in the way of business though without binding the court as to what its decision would be if the power was expressly granted and a constitutional question alone was raised.

The supplying of water, gas, and electricity by a city to its inhabitants[1] is now regarded as a muncipal function,[2] in that an act of the legislature allowing the city to engage in the business of supplying them is now never seriously

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[1] But not to others. *Miller* v. *Pulaski* (1909) 109 Va. 137, 63 S. E. 880. This limitation is probably general, applying in theory, at least, to all businesses in which a city may be given power to engage. But see *Johnson City* v. *Weeks* (1915) 133 Tenn. 277, 180 S. W. 327, where the power to supply the neighboring area with water to prevent the inception of epidemics harmful to the city was implied from a grant allowing the city to maintain waterworks.

[2] *Mitchell* v. *City of Negaunee* (1897) 113 Mich. 359, 71 N. W. 646. It should be pointed out that there was a time in some jurisdictions when this was not settled. *Village of Swanton* v. *Town of Highgate* (1908) 81 Vt. 152, 69 Atl. 667. But today it is. *Rand* v. *Marshall* (1911) 84 Vt. 161, 78 Atl. 790.

questioned.[3] The courts imply the power to carry on these activities on four grounds: first, that the city under its police power can take proper measures to protect the lives, property, and health of its inhabitants;[4] second, that to do anything which is necessary to the general welfare of the inhabitants of the city is a public purpose;[5] third, that the use of the streets is essential to the supply of these commodities, which renders it more practical for the city to supply them;[6] fourth, that the city has the undoubted right to maintain works for supplying the streets and its own public buildings with water, gas and electricity, and it being economical to produce these commodities in large quantities, the city has the right to dispose of the surplus to its inhabitants.[7] All of these arguments are logically falacious. The fact that the city supplies electric light to homes has at best a problematical effect on the extent of crime. And while supplying water to its inhabitants allows it to make certain of a pure supply and thus protect health, the logical extension of this claim would allow the city to supply all the food and even certain toilet articles which its inhabitants might use. Needless to say these are powers which a municipal corporation has never claimed to have. The fact that the general welfare of the city's inhabitants is promoted does not of itself constitute a public purpose. This will be seen later in the discussion of attempts by a city to aid manufacturing plants to induce them to locate within the city limits. The plant in many cases would undoubtedly promote the general welfare but this does not permit the city to tax for its benefit. As for the argument based on the use of the streets, services are rendered by private enterprise, such as railways, telegraphs, and telephones involving a similar permanent use of the streets; and it will be seen that courts have been reluctant to imply such powers, and under some circumstances have questioned the constitutionality of an express grant. The last argument lacks the merit of truth in its premise. Supplying its inhabitants cannot be considered incidental to supplying the needs of a city. Yet the courts in testing the validity of taxes for these enterprises have come to regard the proposition of whether they are for a public purpose now as settled to such a degree that in the later cases the point is not even raised, the argument on the question of whether or not the tax was authorized assuming that.[8] The power to build works to supply a city with these commodities is now sometimes regarded as implied in the grant of a charter.[9]

[3] *Middleton* v. *City of St. Augustine* (1900) 42 Fla. 287, 29 So. 421; *Mealey* v. *Hagerstown* (1901) 92 Md. 741, 48 Atl. 746; *Miller* v. *Pulaski* (1912) 114 Va. 85, 75 S. E. 767; *City of Oxnard* v. *Bellah* (1913) 21 Cal. App. 33, 130 Pac. 701; *Clark* v. *Los Angeles* (1911) 160 Cal. 30, 116 Pac. 722.

[4] See *Ellinwood* v. *City of Reedsburgh* (1895) 91 Wisc. 131, 134, 64 N. W. 885; *Eau Claire Water Co.* v. *Eau Claire* (1907) 132 Wisc. 411, 418, 112 N. W. 458; *Keenan & Wade* v. *City of Trenton* (1914) 130 Tenn. 71, 78, 79, 168 S. W. 1053; *City of Albuquerque* v. *Water Supply Co.* (1918) 24 N. Mex. 368, 405, 174 Pac. 217.

[5] See *Jacksonville Elec. L. Co.* v. *City of Jacksonville et al* (1895) 36 Fla. 229, 265, 18 So. 677.

[6] See *Opinion of the Justices* (1890) 150 Mass. 592, 595, 24 N. E. 1084; *State ex rel.* v. *City of Toledo* (1891) 48 Ohio St. 112, 137, 26 N. E. 1061.

[7] See *Hequembourg* v. *City of Dunkirk* (1888) 49 Hun. 550, 555, 2 N. Y. Supp. 447; *Traverse City* v. *Blair Tp.* (1916) 190 Mich. 313, 314 *et seq.*, 157 N. W. 81; *Overall* v. *City of Madisonville* (1907) 125 Ky. 684, 692, 102 S. W. 278.

[8] *Cf. Rand* v. *Marshall, supra,* footnote 2; *Cary* v. *Blodgett* (1909) 10 Cal. App. 463, 102 Pac. 668; *Chandler* v. *Seattle* (1914) 80 Wash. 154, 141 Pac. 331; *Baker* v. *Cartersville* (1906) 127 Ga. 221, 56 S. E. 249; *Ostrander* v. *City of Salmon* (1911) 20 Idaho 153, 117 Pac. 692; *Red Springs Hotel Co.* v. *Red Springs* (1911) 157 N. C. 137, 72 S. E. 837.

[9] *City of Crawfordsville et al.* v. *Braden* (1891) 130 Ind. 149, 28 N. E. 849; *Ellinwood* v. *City of Reedsburgh, supra,* footnote 4; *Henderson Water Co.* v. *Trustees* (1909) 151 N. C. 171, 65 S. E. 927; *Swindell* v. *Belhaven* (1917) 173 N. C. 1, 91 S. E. 369; *Bernheim* v. *Town of Anchorage* (1914) 159 Ky. 315, 167 S. W.

The discussion of what kinds of business a municipal corporation may engage in, may be most profitably restricted to those types which have come before a court for review. These can be roughly grouped in six classes—those connected with highways, as maintenance and operation of railroads, wharves, terminal depots, ferries and the like; the maintenance and operation of other public utilities; the sale of commodities, chiefly fuel and ice; the building and management of places of entertainment; the leasing of public lands; and the purchase of stock in other corporations, engaging with them or individuals in joint enterprises, or loaning them or individuals means for carrying on their businesses.

The cities' power to operate businesses on a highway is based on their undoubted power to regulate the highways and their duty to maintain them. In this regard it has been held that the maintenance of a wharf accessible to the public is a municipal function.[10] But as pointed out by one court, the carrying of passengers along the highway is no part of either building, maintaining, or regulating that highway.[11] Yet the vast weight of authority is in favor of the existence of the power,[12] to such an extent that the constitutionality of a statute granting it appears to be tacitly assumed.[13] The court in the recent case of *City of New York v. Brooklyn City R. R.* (1922) 232 N. Y. 463, 134 N. E. 533,[14] devotes its opinion to a discussion of whether or not authority was granted the city and treats the constitutional point as settled. The reasoning which settled the question was that the power was derivative from the existing power of controlling highways.[15] In some states there are constitutional inhibitions directed against the state's participation in internal improvements. This inhibition extends to municipal corporations as organs of the state and prevents them from building and operating railroads.[16]

In regard to public utilities other than those mentioned, it was found that one municipality received judicial sanction for maintaining telephone service.[17] The court reasoned that that which renders the public service is a public purpose

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139. The power has been interpreted to include the selling of materials incidental to the selling of the commodity, as the selling of electric light bulbs, and other appliances where there was express power to sell electricity, *Andrews* v. *City of South Haven* (1915) 187 Mich. 294, 153 N. W. 827; and also to dispose of surplus electricity to run machinery. *McDonald* v. *Ward* (1918) 201 Ala. 245, 77 So. 835.

[10] *Commonwealth* v. *Pittsburgh* (1897) 183 Pa. St. 202, 38 Atl. 628 (make surveys for a canal); *Nicholls* v. *Charlevoix Circuit Judge* (1909) 155 Mich. 455, 120 N. W. 343 (wharf). This power, like the others discussed is the result of a gradual growth. In one early case it was held insufficient to allow the city to build a bridge. *Clark* v. *The City of Des Moines* (1865) 19 Iowa 199.

[11] *Attorney General* v. *Detroit Common Council* (1907) 148 Mich. 71, 111 N. W. 860.

[12] *Walker* v. *City of Cincinnati, et al* (1871) 21 Ohio St. 14; *Sun Publishing Ass'n.* v. *The Mayor* (1897) 152 N. Y. 257, 46 N. E. 499; *Admiral Realty Co.* v. *City of New York* (1912) 206 N. Y. 110, 99 N. E. 241; *In re Opinion of the Justices* (1919) 231 Mass. 603, 122 N. E. 763; *Tulloch* v. *Seattle* (1912) 69 Wash. 178, 124 Pac. 481; *State, ex rel.,* v. *Weiler* (1920) 101 Ohio St. 123, 128 N. E. 88.

[13] *Cf. Barsaloux* v. *City of Chicago* (1910) 245 Ill. 598, 92 N. E. 525; *Schinzel* v. *Best* (1904) 45 Misc. 455, 92 N. Y. Supp. 754; *Brooklyn City R. R.* v. *Whalen* (1920) 111 Misc. 348, 181 N. Y. Supp. 208 (bus lines); *State ex rel. Peabody* v. *Superior Court* (1914) 77 Wash. 593, 138 Pac. 277.

[14] This case was decided in favor of the defendant on trial, (1921) 115 Misc. 94, 187 N. Y. Supp. 523, reversed on appeal, (1921) 198 App. Div. 737, 191 N. Y. Supp. 20, and reaffirmed by the instant case. All three opinions are devoted to the determination of whether there was legislative authority. The constitutional point was mentioned but treated as settled.

[15] See *In re Opinion of the Justices, supra,* footnote 12, p. 608.

[16] *Attorney General* v. *Pingree* (1899) 120 Mich. 550, 79 N. W. 814; *Attorney General* v. *Detroit Common Council, supra,* footnote 11.

[17] *Spangler* v. *City of Mitchell* (1915) 35 S. Dak. 335, 152 N. W. 339.

for which there may be taxation. The case standing alone cannot be said to be decisive.

The authorities are in hopeless conflict as to whether cities have the power to sell merchandise to their inhabitants. Ice plants are allowed on the ground that water may be sold in any of its physical forms.[18] This is ably refuted by courts which refuse to permit cities to build them.[19] Fuel yards are likewise allowed and prohibited.[20] Some courts take a middle ground, permitting cities to sell fuel in times of shortage.[21] Others fail to makes this distinction.[22] Isolated cases on various allied industries can be found holding both ways.[23]

The power of a city to provide entertainment for its inhabitants is not one often employed. Libraries may be supported by cities.[24] And as an extension of the power to maintain parks, monuments may be erected.[25] It seems, however, that it is doubtful whether running a theatre is a municipal purpose.[26]

A city may not only lease land which it acquired for an authorized purpose, pending or after its usefulness as such, but may also lease portions of public buildings.[27] The rule in regard to the latter seems to be that the city in anticipation of growth may erect larger buildings than it at present needs and may lease the excess portions. But it may not acquire lands or buildings for the purpose of leasing them.[28]

Many state constitutions prohibit municipal corporations from taking stock in other corporations [29] or going into joint enterprises with private capital.[30] In a few states, however, they are expressly empowered to buy stock in corporations of a quasi-public character. Practically everywhere it is held that cities may not appropriate money to aid,[31] or loan individuals or corporations,[32] or buy land or

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[18] See *Holton* v. *Camilla* (1910) 134 Ga. 560, 567, 68 S. E. 472.

[19] *State ex rel. Kansas City* v. *Orear* (1919) 277 Mo. 303, 210 S. W. 392; *Union Ice & Coal Co.* v. *Town of Ruston* (1914) 135 La. 898, 66 So. 262.

[20] In favor of the power: *Laughlin* v. *City of Portland* (1914) 111 Me. 486, 90 Atl. 318; *Central Lumber Co.* v. *City of Waseca* (Minn. 1922) 188 N. W. 275; *Stevenson* v. *Port of Portland* (1917) 82 Ore. 576, 162 Pac. 509 (allows sale of coal to ships)—denying the power: *Opinion of the Justices* (1892) 155 Mass. 598, 30 N. E. 1142; see *Baker* v. *City of Grand Rapids* (1906) 142 Mich. 687, 690, 106 N. W. 208. The United States Supreme Court has held that a fuel yard is a public purpose but regard must be had to the circumstances of the locality. *Jones* v. *City of Portland* (1917) 245 U. S. 217, 38 Sup. Ct. 112.

[21] *Opinion of the Justices* (1903) 182 Mass. 605, 66 N. E. 25

[22] See *Baker* v. *City of Grand Rapids, supra,* footnote 20, p. 687.

[23] See *Huessing* v. *City of Rock Island et al.* (1899) 128 Ill. 465, 477, 21 N. E. 558 (allows a municipal abattoir); *Equitable Loan & Security Co.* v. *Edwardsville* (1905) 143 Ala. 182, 38 So. 1016 (allows town to sell liquor).

[24] *Lambert, Mayor* v. *Trustees Public Library, etc.* (1913) 151 Ky. 725, 152 S. W. 802.

[25] It can provide appropriate entertainment for special occasions in its parks. *Hubbard* v. *Taunton* (1886) 140 Mass. 467, 5 N. E. 157 (appropriation for band).

[26] Can not run a moving picture theater. *State, ex rel.,* v. *Lynch* (1913) 88 Ohio St. 71, 102 N. E. 670. Nor give a pageant. *Historical Pageant Ass'n of City of Philadelphia* v. *Philadelphia* (1918) 260 Pa. St. 447, 103 Atl. 824. It can run an opera house. See *Egan* v. *San Francisco* (1913) 165 Cal. 576, 580, 133 Pac. 294. It can build an auditorium. See *City and County of Denver* v. *Hallett* (1905) 34 Colo. 393, 398, 83 Pac. 1066; *Wilkerson* v. *City of Lexington* (1920) 188 Ky. 381, 222 S. W. 74.

[27] At least one state allows cities to maintain buildings expressly to rent for purposes of fostering trade. *Spaulding* v. *Lowell* (1839) 40 Mass. 71.

[28] *Opinion of the Justices* (1910) 204 Mass. 607, 91 N. E. 405.

[29] *Weismer* v. *Village of Douglas* (1876) 64 N. Y. 91.

[30] *Lord* v. *Denver* (1914) 58 Colo. 1, 143 Pac. 284; *Pleasant Township* v. *Aetna Life Ins. Co.* (1891) 138 U. S. 67, 11 Sup. Ct. 215.

[31] *Curtis' Adm'r* v. *Whipple* (1869) 24 Wisc. 350; *Sutherland-Innes Co.* v. *Village of Evart* (C. C. A. 1898) 86 Fed. 597; *Dodge* v. *Mission Tp.* (C. C. A. 1901) 107 Fed. 827.

materials to lend them. This prevents a city from offering financial inducements to an enterprise to locate within its borders,[33] and also frustrates such attempts as have been made by cities to rehabilitate sections visited by severe fires or other misfortunes, by loaning money, land or materials to the sufferers.[34] The courts have consistently interpreted taxes so designed as for a private purpose and hence unconstitutional.

The test of what a city may supply to its inhabitants would seem to be what the spirit of the community demands, tempered by the restraining influence of the courts. The rules remain but their interpretation changes. The tendency is towards allowing the municipality greater freedom. Precise limits cannot be set nor can they be deduced from logic. The only standard at all workable seems to be that a municipal corporation in supplying its inhabitants with such reasonably necessary commodities and services as experience shows cannot be supplied as practically and as beneficially by private enterprises, is employed in a public purpose. Where the courts find a public purpose they are more willing to find authorization—once this is found, as has been seen, the constitutionality of the authorization is rarely questioned.

ADMISSIBILITY OF LOCAL USAGE WHICH IS UNKNOWN TO THE OTHER CONTRACTING PARTY.—Although often used synonymously, there is a well recognized distinction between "custom" and "usage."[1] Usage is an habitual mode of action which depends for its efficacy on the actual or presumed assent of the parties, and is usually not binding unless known. Custom is that length of usage which by an infinity of repetition has acquired a greater rigidity, inflexibility, notoriety and generality than usage. It acquires its efficacy from its adoption into the law; it does not depend upon the assent of the parties, and ignorance of it is no more an excuse than ignorance of the law. Parties may reject usage; custom is immutable. Custom is of importance in any branch of the law; usage only in consensual agreements. Custom has been recognized from earliest times as a source of law while the function of usage in contracts is of comparatively recent origin, the first case of importance having been decided by Lord Mansfield in 1779.[2]

Evidence of usage is admissible in an action on a contract for two purposes: to define terms and to add incidents not expressed by the parties to the agreement.[3] At early law, words had a formal significance and were supposed to have only one unalterable meaning.[4] As a result, evidence of usage to define

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[32] *Loan Association* v. *Topeka* (1874) 87 U. S. 655; *Parkersburg* v. *Brown* (1882) 106 U. S. 487, 1 Sup. Ct. 442; *Cole* v. *LaGrange* (1885) 113 U. S. 1, 5 Sup. Ct. 416.

[33] *Hanson* v. *Vernon* (1869) 27 Iowa 28 (railroad); *The People* v. *Salem* (1870) 20 Mich. 452 (railroad); *Allen* v. *Inhabitants of Jay* (1872) 60 Me. 124 (sawmill); *Markley* v. *Village of Mineral City* (1898) 58 Ohio St. 430, 51 N. E. 28 (land for factories). *Brewer Brick Co.* v. *Brewer* (1873) 62 Me. 62, went so far as to declare a statute unconstitutional excusing manufacturing corporations from payment of taxes on this ground.

[34] *The State, ex rel.* v. *Osawkee Township* (1875) 14 Kan. 418 (buying grain to sell farmers on credit to relieve pressing want); *Feldman & Co.* v. *City Council* (1884) 23 S. C. 57 (loans to rebuilders after fire).

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[1] See *Walls* v. *Bailey* (1872) 49 N. Y. 464, 471; *Eames* v. *Claflin Co.* (C. C. A. 1917) 239 Fed. 631, 634; *Byrd* v. *Beall* (1907) 150 Ala. 122, 126, 43 So. 749; Leddy, *The Admissibility of Evidence of Usage and Custom* (1922) 67 N. Y. L. J. 1098.

[2] *Wigglesworth* v. *Dallison* (1779) 1 Douglas 201.

[3] See *In re Sutro & Co. and Heilbut, Symons & Co.* [1917] 2 K. B. 348, 365; *Humfrey* v. *Dale* (1857) 7 El. & Bl. 266, 273 *et seq.*

[4] 4 Wigmore, *Evidence* (1905) § 2462.